CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the counsel of record for Southwestern Bell Telephone Company and Accelerated Connections, Inc. via hand-delivery, first-class mail, or telecopier this 13th day of January, 2000.

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Southwestern Bell

June 28, 1999

Christopher V. Goodpastor
Senior Counsel
Covad Communications Company
2330 Central Expressway
Santa Clara, CA 95050

Re: Interconnection Agreement Negotiations for Kansas, Missouri, Oklahoma and Arkansas

Dear Mr. Goodpastor:

This is in response to your June 23, 1999 letter, on behalf of Covad advising that Covad would like to execute a master interconnection agreement with Southwestern Bell Telephone Company ("SWBT") to govern the relationship between Covad and SWBT in Kansas, Missouri, Oklahoma and Arkansas. You also advised that in your view, most of the provisions of the master agreement would apply uniformly to all four states, but would allow the parties to negotiate separate loop rates and other charges for each particular state. To that end, you proposed that the parties enter into a master interconnection agreement in Missouri, Oklahoma, Kansas and Arkansas ("MOKA") according to the terms of either: (1) Covad's Interconnection Agreement with SWBT's sister corporation, Pacific Bell, or (2) an interconnection agreement consistent with the ruling of the arbitration panel in the pending arbitration between the parties in Texas.

Please be advised that SWBT is not amenable to Covad's proposal for the reasons set forth below.

First, please note that Covad previously submitted requests to SWBT for negotiations in Oklahoma and Arkansas on April 21, 1999, Missouri on February 19, 1999 and Kansas on March 15, 1999. Subsequently, Covad elected not to pursue such negotiations due to the pending arbitration proceedings in Texas. Therefore, by resubmitting its requests with respect to Oklahoma, Kansas, Arkansas and Missouri by way of your June 23, 1999 letter, we assume that such request constitutes a proposal to restart "the clock" in each of those respective states. Please let us know if our assumption is not accurate.

Second, as addressed in SWBT's February 19, 1999 letter in response to Covad's request for negotiations in Missouri, SWBT is not amenable to Covad's request that its

agreement with PacBell be used as the "model" for negotiations between SWBT and Covad in any of the MOKA states. Covad submitted the same request to SWBT when we commenced our negotiations in Texas last July. At that time, and in subsequent correspondence to Covad, including a September 28, 1998 letter to Mr. Prince Jenkins, Senior Counsel with Covad, SWBT advised that we could not agree to Covad's request for a number of reasons. Specifically, we explained that Covad's California Agreement is with an entirely different company (PacBell as opposed to SWBT), is formatted entirely different than SWBT's generic Agreement and contains different arbitration results, reflects a different network reconfiguration, different rules and regulations, etc. Ultimately, as you know, SWBT and Covad agreed to negotiate from the SWBT/AT&T Interconnection Agreement in Texas.

SWBT's position has not changed since July 1998, and for all of the reasons articulated above, SWBT is not amenable to Covad's latest proposal to negotiate from its California Agreement for an interconnection agreement in any of the MOKA states.

In addition, SWBT does not have a "master agreement" which would be available in all four MOKA states. Rather, we will need to negotiate an Agreement in each of the respective states. There are different arbitration results, including different rates, different regulatory rules and different laws that are applicable in each of the MOKA states. Although SWBT has generic Agreements for its five states, there are some clauses in each of the Agreements that vary by state for the reasons set forth above. However, Covad has many other options available to it in each of the MOKA states. For instance, in each state, Covad has the option of negotiating from SWBT's generic Interconnection Agreement or from one of the Interconnection Agreements between SWBT and another CLEC which has been filed and approved in that state, or Covad could adopt the terms and conditions of an Interconnection Agreement currently in place pursuant to Section 252(i) of the Act in each of the respective states.

SWBT does not believe it would be appropriate and is unwilling to enter into any Agreement in one state based upon the arbitration results of another state. Therefore, SWBT specifically rejects Covad's offer to enter into an agreement in any of the MOKA states based upon the interim arbitration ruling entered in Texas.

Finally, as to your suggestion that we schedule a meeting between the parties to conclude negotiations at Covad's corporate headquarters in Santa Clara, California the week of July 12, 1999, please be advised that SWBT would like for the initial meeting to take place via conference call or for Covad to travel to one of SWBT's states for this meeting since Covad has requested negotiations with SWBT for four of SWBT's states. Most of our employees who will be interfacing with Covad are located in Dallas, and therefore, we would prefer to meet in Dallas, but would be happy to meet Covad at our offices in Missouri, Oklahoma, Kansas or Arkansas if one of those locations is preferable. A specific date for and location of the meeting may be arranged by contacting Mae

Marshall, SWBT Account Manager for Covad, at 214-464-5676. SWBT is currently available for a meeting the week of July 12, however, in advance of that meeting, we would appreciate Covad identifying to SWBT which Agreement in each of the respective states at issue Covad wishes to negotiate from or to opt into under the terms of Section 252(i) of the Act. That would greatly move the process along for purposes of our initial negotiations session.

We hope that this information is helpful to you. We look forward to hearing from you.

Yours very truly,

Patricia McHugue

RHYTHMS LINKS, INC.
1/13/00

TABLE OF CONTENTS

DOCKET NO. 20226

PETITION OF ACCELERATED CONNECTIONS, INC., d/b/a ACI CORP. FOR ARBITRATION TO ESTABLISH AN INTERCONNECTION AGREEMENT WITH SOUTHWESTERN BELL TELEPHONE COMPANY	§ § § § § §	PUBLIC UTILITY COMMISSION OF TEXAS

DOCKET NO. 20272

PETITION OF DIECA COMMUNICATIONS, INC., d/b/a COVAD COMMUNICATIONS COMPANY FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, CONDITIONS AND RELATED ARRANGEMENTS WITH SOUTHWESTERN BELL TELEPHONE COMPANY	§ § § § § § § §	PUBLIC UTILITY COMMISSION OF TEXAS

RESPONSE OF RHYTHMS LINKS, INC. TO THE COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY CONCERNING ARBITRATION AWARD AND PROPOSED INTERCONNECTION AGREEMENTS

Date Filed:
January 13, 2000

333

DOCKET NO. 20226

PETITION OF RHYTHMS LINKS, INC. TO ESTABLISH AN INTERCONNECTION AGREEMENT WITH SOUTHWESTERN BELL TELEPHONE COMPANY	§ § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

DOCKET NO. 20272

PETITION OF DIECA COMMUNICATIONS, INC., D/B/A COVAD COMMUNICATIONS FOR ARBITRATION OF INTERCONNECTION RATES, TERMS, CONDITIONS AND RELATED ARRANGEMENTS WITH SOUTHWESTERN BELL TELEPHONE COMPANY	§ § § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

RESPONSE OF RHYTHMS LINKS, INC. TO THE COMMENTS OF SOUTHWESTERN BELL TELEPHONE COMPANY CONCERNING ARBITRATION AWARD AND PROPOSED INTERCONNECTION AGREEMENTS

TO THE HONORABLE COMMISSIONERS:

NOW COMES Rhythms Links, Inc. ("Rhythms"), and pursuant to Proc. R. 22.78 files this Response to the Comments of Southwestern Bell Telephone Company ("SWBT") Concerning Arbitration Award and Proposed Interconnection Agreements. Rhythms respectfully requests the Commission to reject SWBT's comments and decline to modify the arbitration award because SWBT's comments are procedurally and substantively flawed.

I. SWBT's Comments are Procedurally Flawed

SWBT's "Comments Concerning Arbitration Award and Proposed Interconnection Agreements" are procedurally improper for several reasons. First, SWBT's January 6 filing constitutes a premature, and thus improper, effort to affect the outcome of the arbitration. As

discussed in detail below, there is no procedure through which SWBT may seek rehearing of an arbitration award prior to the Commission's final determination.[1] SWBT has a right under the FTA, to appeal once the award has been affirmed by the Commission. Thus, SWBT will have the opportunity to address any issues it has with the arbitration award. SWBT itself identifies a number of procedural avenues available for review of the arbitration award, and expressly reserves its right to pursue them.[2] However, in the interim, SWBT should be held to the same set of rules that every other party must follow.

Although SWBT captioned its filing as comments, the filing is actually a pleading seeking rehearing of the entire arbitration award prior to a Commission vote. SWBT discusses issues that are far greater in scope and number than the areas of disagreement in the implementing language filed by the parties. SWBT even protests some aspects of the arbitration award for which the parties reached agreement on implementing language in their joint filing. Clearly, SWBT's pleading is not merely an explanation of the company's position regarding contract language for the interconnection agreement. SWBT expressly asks the Commission to "grant SWBT a rehearing opportunity in these dockets prior to approving the Agreements."[3] Because SWBT is asking for rehearing prior to the Commission's approval of the interconnection agreement, SWBT's pleading is procedurally

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[1] Rhythms' concerns should not be construed as unreasonable or blind insistence on procedural nits. There are sound reasons behind the Commission's rules, which prevent parties from attempting to influence the outcome of an arbitration after the hearing is completed but before the Commission has an opportunity to render its judgment. Rhythms is merely seeking to ensure these rules are allowed to work.

[2] Comments of Southwestern Bell Telephone Company Concerning Arbitration Award and Proposed Interconnection Agreements, ("SWBT Pleading") p. 6.

[3] SWBT Pleading, p. 5.

improper and should be stricken, or in the alternative, given no weight by the Commission in finalizing the arbitration award.

Any attempt to overrule the Arbitrator's Award in this proceeding is outside the scope of the applicable Commission rules and statutes. Once an Arbitrators' Award has been issued, as it has in this case, the Commission's procedural rules establish the filing of a conforming interconnection agreement as the next procedural step, followed by final Commission approval of the interconnection agreement. There is no procedure by which SWBT may seek reconsideration of the Arbitrators' award prior to a Commission vote. Therefore, Rhythms moves to strike the pleading from the record, or in the alternative to be excluded from consideration in evaluating the merits of the arbitration award.

Second, the procedural rule on which SWBT relies does not support its effort to file new comments or attempt to modify the arbitration award. SWBT cites Proc. Rule 22.309 as the basis for its comments, but the rule allows comments only by interested parties who wish to comment on whether an interconnection agreement is in the public interest and is consistent with the Federal Telecommunications Act. Interested parties, while not defined, clearly was not intended to afford the *parties* to the arbitration itself an opportunity to lobby the Commission to change the arbitration award. Indeed, the rule even states that when interested persons, ORA, or OPUC, file comments they must serve them on each of the parties to the agreement. SWBT's citation to this rule is thus inapposite and incorrectly applied. The pleading has no procedural basis, and therefore, should not be considered by the Commission.

Third, SWBT's pleading is duplicative. On December 7, 1999, SWBT filed a letter titled "Request for Briefing and Rehearing on Arbitration Award." SWBT asked the Commission to

reopen the arbitration hearing, which was completed in June, to allow for new briefing. Rhythms opposed that request as procedurally improper for the same reasons discussed above. The Commission declined to take any action on SWBT's request, stating instead that any consideration would occur in conjunction with the Commission's scheduled vote on the arbitration award January 13, 2000. SWBT's January 6 "comments," filed only a week before the Commission was scheduled to vote on the arbitration award, cover the same ground, in fact, using identical language in some sections. A consideration of SWBT's comments will serve no useful purpose. To the contrary, reopening the arbitration hearing would significantly harm Rhythms, which has already been delayed entering the Texas DSL market by more than a year.[4] SWBT has already argued in great detail all of the reasons it would like to see the arbitration award overturned or modified. The Commission should not expend resources on a second, duplicative request to dismantle the well-reasoned and well documented results of the arbitration award.

Notwithstanding the foregoing, in the event the Commission opts to consider SWBT's pleading, Rhythms respectfully requests the Commission give the filing no weight in evaluating the merits of the arbitration award. SWBT's pleading is substantively incorrect, as discussed below.

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[4] SWBT's assertion that the Interim Agreement ensures Rhythms will not be harmed by a delay in approving the arbitration award is false. As SWBT well knows, the Interim Agreement is a remedial measure to make up for the lengthy delays suffered by Rhythms due to the improper conduct of SWBT during the hearing. It set up only a skeleton framework that enabled Rhythms to begin ordering the necessary infrastructure to support DSL services. Thus, on its face, the Interim Agreement cannot meet all of Rhythms' needs in providing DSL services. But further, the Agreement is not sufficient because SWBT has taken a very narrow approach to implementing the Agreement, and has been unwilling to take any action not expressly required. Rhythms discussed these operational problems in affidavits submitted in the public interest portion of Project No. 16251.

II. SWBT's Arguments Are Substantively Flawed

SWBT's 23-page pleading presents a scatter shot of concerns about the results of the arbitration award. However, SWBT's arguments fall into the following three categories and are most easily evaluated in that manner: a) material relied upon to support the award; b) SWBT's obligations for provisioning of Operations Support Systems ("OSS"); and c) costs for loop makeup, loops and conditioning.

A. Material Relied Upon to Support Award

SWBT complains at various points that the arbitration award relies on facts/issues/matters[5] not addressed in this proceeding, and that information from the hearing a few months ago is "stale."[6] Additionally SWBT complains that the arbitration award relies on law not addressed in the arbitration hearing. Both arguments are wrong.

SWBT does not cite to a single "fact" or issue it believes the arbitrators relied on that was not contained in the record. Furthermore, SWBT does not point to any fact in the arbitration award that it claims is incorrect. Thus, SWBT's argument questioning the factual basis of the arbitration award is without merit and should be rejected. In addition, the Commission should reject SWBT's efforts to do precisely what it incorrectly accuses the Arbitrators of doing – relying on facts not in the record. At least four sections of SWBT's pleading attempts to introduce completely new evidence or arguments not in the record, and asks the Commission to rely on this information to modify the arbitration award. For example, SWBT cites to developments in the Section 271

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5 SWBT Pleading, pp. 4-6.

6 SWBT Pleading, p. 4.

proceeding regarding modifications it has made to its OSS system. SWBT points to such modifications as a justification for asking the Commission to relieve it of its obligations under the arbitration award to upgrade its OSS. SWBT similarly relies on new information when arguing that the arbitration award set digital loop rates incorrectly. SWBT also introduces a completely new argument, without any citation to the record, that shielded cross-connects should be offered only for ADSL. If SWBT wished to present additional information or experts on these issues, it had ample opportunity at the hearing. SWBT must not now be allowed to introduce new information and argument that is outside the record in the arbitration hearing, and the Commission should strike or ignore all such material.[7]

Further, SWBT attempts to undermine the facts that are in the record. SWBT asserts that all parties should concede the "staleness" of the information because the DSL industry has changed. Rhythms does not concede this point. To the contrary, Rhythms has full confidence in the extremely detailed record in this proceeding compiled from thousands of pages of discovery and more than 20 depositions with SWBT's internal subject matter experts. SWBT does not provide any explanation of the part of the record it believes is outdated. Moreover, even if the record were outdated, SWBT should be estopped from complaining, since it was SWBT's own abuse of the discovery process that caused delays in the final issuance of the arbitration award. SWBT's argument also is incorrect, because the record in this proceeding is up-to-date. Though SWBT neglects to mention it, the record was supplemented after a lengthy delay created by SWBT's discovery abuses during the arbitration.

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[7] SWBT Pleading, p. 8 (Section C.), p.17 (Section E), p.18(Section F).

SWBT also complains that the Arbitrators relied on law not in the record – the FCC's UNE Remand Order,[8] the FCC's SBC/Ameritech Merger Order,[9] and the T2A.[10] SWBT's allegations that the parties have not had the opportunity to comment or offer evidence on these documents is irrelevant and incorrect. First, the FCC's orders constitute binding precedent in effect at the time of the Arbitration Award.[11] The Arbitrators properly applied the law contained in these FCC orders to the facts in this case. SWBT now wants to relitigate the outcome of the FCC decisions under the guise of additional briefing in this case. Such briefing is irrelevant because it would not change the outcome of the FCC orders already rendered. Second, SWBT is incorrect in its assertions that it had an inadequate opportunity to comment on the three documents. Third, all of the holdings in the arbitration award are fully supported by the record compiled and introduced by Rhythms and Covad. The Arbitrators cite the FCC orders merely to demonstrate that the arbitration award is in compliance with that binding law.

a. FCC UNE Remand Order

SWBT was a party in the FCC's UNE remand proceeding. Indeed, SWBT participated heavily in the proceeding, filing comments and presenting positions to FCC Commissioners and

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[8] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999).

[9] *In Re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines*, CC Docket No. 98-141, Memorandum Opinion and Order, FCC 99-279 (rel. Oct. 8, 1999).

[10] *Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market*, Project No. 16251, Order No. 55, Approving the Texas 271 Agreement (October 13, 1999) ("Texas 271 Agreement" or "T2A").

[11] Ironically, SWBT itself acknowledges the legitimacy of the FCC orders by asserting that the Commission should reopen the arbitration hearing because the award must be consistent with FCC regulations. SWBT Pleading, p. 5.

staff. SWBT should not be heard now to complain that its lobbying efforts failed to produce all that SWBT desired. Rhythms' arbitration award is not the proper forum for SWBT to re-argue its position regarding UNE Remand. If SWBT wants to challenge the validity of the UNE Remand order, it may do so. Until that time, however, the order is controlling legal authority, and the arbitration award is legally required to be consistent with the order.

b. SBC/Ameritech Merger Conditions

Second, with respect to the SBC Ameritech Merger Conditions, SWBT and its parent were obviously extensively involved in this matter. Interestingly, SWBT originally objected when Rhythms offered for admission into evidence an earlier iteration of the SBC/Ameritech merger conditions, and subsequently SWBT itself provided as a late-filed, post-hearing exhibit, the final version of the SBC/Ameritech Merger conditions and asked that it be officially noticed. (See SWBT motion, October 26, 1999). As with the UNE Remand Order, the SBC/Ameritech Merger Conditions order is legally binding and the arbitration award should be consistent with it. However, the arbitration award is not constrained by the requirements of the order. As discussed in detail below, the FCC expressly stated that the Merger Conditions establish a minimum set of requirements, not a ceiling, for SWBT.

c. T2A

The T2A is SWBT's generally available interconnection agreement for CLECs in Texas. It was developed with involvement from literally dozens of SWBT employees, including the precise SWBT employees involved in this Arbitration proceeding. SWBT utilized the same attorneys and experts who represented SWBT in this Arbitration to develop Appendix 25 related to DSL in Project 16251. To even suggest that SWBT did not have involvement in, and contribute comments on, this

document is indeed disingenuous.

SWBT argues incorrectly that reliance on the T2A to the Arbitration Award is inappropriate. The arbitrators properly do not and should not rely on the T2A as the basis of the arbitration award. To the contrary, SWBT and CLECs agreed in proceedings in Project No. 16251, that the DSL Appendix in the T2A would be replaced by the DSL Appendix in the interconnection agreement mandated by the arbitration award.[12]

SWBT's argument that the Arbitrators relied on facts, issues and law outside the record is thus without merit and should be rejected.

B. SWBT's Obligations for Provisioning OSS

SWBT complains that it "*may not be able to meet*" the requirements of the arbitration award regarding pre-ordering processes.[13] However, SWBT never states that it *cannot* meet the requirements. Instead, SWBT seeks permission from the Commission to "negotiate down" its obligations before it even attempts to comply with them. The obligations of the arbitration award are reasonable, based on the full, detailed record in this proceeding, and are consistent with SWBT's federal obligations. SWBT argues that the Arbitration Award is inconsistent with the SBC/Ameritech Merger Conditions because the Arbitrators order electronic OSS availability prior to the availability date ordered in the Merger Conditions. SWBT protests that to provide electronic OSS in Texas before it is available in other states will require development of separate processes. SWBT's arguments are incorrect and should be rejected for several reasons. First, the Arbitrators had ample evidence that the OSS features and capabilities specified in the Arbitration Award are

[12] Final DSL Attachment, Project 16251, Sections 1.1, 10.1.

[13] SWBT Pleading, p. 3.

already under development for SWBT's internal operations. For example, the record clearly documents that SWBT already has databases (LFACS and LEAD) with the type of loop makeup information CLECs need, and that SWBT's internal operations have access to these databases. Thus, making a loop makeup information and mechanized OSS available to competitors is entirely feasible[14] and is required by the FTA. Further, SWBT has made clear during the arbitration, and in its Plan of Record detailing its intentions for OSS deployment, that it intends to roll out new services and capabilities on a uniform basis throughout its 13-state region. Thus, SWBT should expect to rollout the OSS capabilities it is required to offer in Texas under the arbitration award to all 13 states, rather than attempting to "negotiate down" the capabilities it offers in Texas to match the lesser offerings it apparently has planned for other states. For the same reason, SWBT does not need a "grace period"[15] to implement the requirements of the arbitration award in Texas.

Second, the Merger Conditions expressly establish a minimum set of requirements, not a ceiling, for the capabilities SWBT must offer CLECs. In Footnote 2 of the Merger Conditions, the FCC states:

> The intent of these Conditions is to address concerns raised by the proposed merger. To the extent that these Conditions impose fewer or less stringent obligations on SBC/Ameritech than the requirements of any past or future Commission decision or any provisions of the 1996 Act or the Commission or state decisions implementing the 1996 Act or any other pro-competitive statutes or policies, *nothing in these Conditions shall relieve SBC/Ameritech from the requirements of that Act or those decisions.* The approval of the proposed merger subject to these Conditions does not constitute any

[14] However, Rhythms strongly disagrees with SWBT's assertion at page 3 of its pleading that SWBT should be allowed to limit its OSS capabilities to whatever level SWBT perceives it needs for internal operations. As Rhythms explained fully in its brief, the parity requirements of the FTA require SWBT to make available the capabilities competitors need to offer new innovative services, whether or not SWBT intends to support those services or needs those capabilities itself.

[15] SWBT Pleading, p. 9.

> judgment by the Commission on any issue of either federal or state competition law. In addition, these conditions shall have no precedential effect in any forum, and shall not be used as a defense by the Merging Parties in any forum considering additional procompetitive rules or regulations. (emphasis added)

Moreover, there is nothing in either the Merger Conditions or in the FCC Orders referred to in this matter that preempts state jurisdiction to order whatever requirements are necessary after a fully litigated arbitration.

Third, the Arbitrators came to a reasoned conclusion regarding how to get meaningful OSS for DSL implemented in Texas after considering the evidence, the state of SWBT's OSS systems, the capabilities of both the systems and what SWBT is capable of implementing. Conversely, the Merger Conditions are merely a set of requirements with which SWBT volunteered to comply. As such, the Merger Conditions are not a proper measure of the needs of the competitive market; rather they represent the minimum SWBT believed it could commit to in order to get approval for its merger with Ameritech.[16] Therefore, the arbitration award contains the only truly "arms length" set of requirements of CLECs. SWBT should not be allowed to ignore the best and most detailed evidence regarding the OSS capabilities it can offer. Nor should SWBT be allowed to pursue a least common denominator principle, whereby it seeks to implement the least robust OSS from any one state throughout its 13-state region.

[16] Rhythms takes no comfort from SWBT's assertions that modifications to the Merger Conditions might be made as the result of an industry-wide collaborative process. SWBT does not identify what process it means, but is possibly is referencing the Plan of Record it recently filed with the FCC outlining its future methods of operation for OSS, many of which ignore the requirements of the arbitration award in substance and timing. This process consists of CLECs reviewing SWBT's Plan of Record and filing comments. SWBT is free to reject all such comments.

SWBT's argument that the arbitration award creates inconsistent obligations with the Merger Conditions order is thus without merit and should be rejected. The arbitration award is a well-reasoned, thorough analysis of SWBT's capabilities and CLECs' needs for OSS. The Merger Conditions, which are not intended to set a ceiling, but rather a floor, are merely a set of requirements to which SWBT agreed voluntarily in order to get approval for its merger with Ameritech.

C. Costs for Loop Makeup, Loops and Conditioning

SWBT complains that it will be unable to recover its costs, and asserts CLECs will be unjustly enriched by the rates established for loop makeup, loops and conditioning in the arbitration award. However, those rates are supported by the record and fully compliant with the TELRIC costing principles required by the Commission,[17] the FCC[18] and the U.S. Supreme Court.[19] Additionally, SWBT can suffer no harm from the arbitration rates because the charges about which SWBT complains are interim and subject to a true-up after additional costing proceedings are completed.

a. Loop Makeup Information

The arbitration award correctly requires SWBT to provide loop makeup information at no charge so long as it is provided through a manual system. As discussed in detail in Rhythms' brief, a $0 charge for manual loop makeup is fully compliant with TELRIC costing principles. SWBT

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[17] *See* the Arbitration Awards issued in Consolidated Docket Nos. 16189, *et al.*, November 7, 1996, at p. 25, and December 19, 1997, at p. 4 ("Mega-arbitrations").

[18] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, Memorandum Decision and Order, CC Docket No. 96-98, FCC 96-325 at ¶ 1 (Aug. 8, 1996).

[19] *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721, (1999).

argues that the FTA allows a charge for costs incurred to provide loop makeup information. However, the FTA does not allow SWBT to recover its embedded costs. All costs associated with looking up loop makeup information in a manual system reflect embedded costs, not forward-looking TELRIC costs, and thus SWBT is not allowed to recover them. Additionally, SWBT's obligation to provide manual loop makeup information at no charge is not a sufficient justification to increase the length of time SWBT may have to provide such information.[20] The Commission should reject both arguments of SWBT as being without merit.

b. Digital Loop Rates

SWBT argues that digital loop rates should be set at the same rate as other digital loops. SWBT cites to no evidence in the record to support for this new argument. SWBT appears primarily concerned that it will have to set up a billing code to charge a different rate for DSL loops than other types of loops. SWBT has vast experience at billing for telecommunications services and can undoubtedly handle billing for DSL loops properly. Moreover, the digital loop rates are interim, subject to true-up, so SWBT will suffer no harm from the rates set in the arbitration award.

c. Conditioning Costs

The arbitration award correctly sets conditioning costs in the most efficient (i.e., TELRIC-compliant) manner – removal of interfering devices done for all loops in a single binder group of 25 pairs for loops over 18K feet and 50 pairs for loops under 18K feet. SWBT incorrectly argues that such approach will not enable it to recover all of its costs for conditioning. However, SWBT's argument is based on a faulty premise – that CLECs should pay 100% of the cost for SWBT to bring its network into compliance with its own design standards. Rather, a given CLEC would pay 1/50th

[20] *See* SWBT Pleading, p.19.

of the cost for conditioning a loop it uses to provide DSL service, and the remaining pairs in the binder group are available to SWBT. Further, by paying a conditioning charge for loops below 18K, CLECs are actually being required to pay some of the costs for SWBT to bring its network into compliance with its own design standards.

III. Conclusion

WHEREFORE PREMISES CONSIDERED, Rhythms respectfully moves that the Commission strike SWBT's January 6 pleading from the record, or in the alternative, give it no weight when evaluating the arbitration award. As demonstrated above, SWBT's pleading is both procedurally and substantively flawed. Rhythms respectfully requests that the Commission reject SWBT's attempt to alter the arbitration award prior to the Commission's vote, and to grant Rhythms such further relief to which it is entitled.

Respectfully submitted,

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By: _____
Dineen J. Majcher
State Bar No. 12851236

ATTORNEYS FOR RHYTHMS LINKS, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the counsel of record via hand-delivery, first-class mail, or telecopier this 13th day of Jan, ~~1999~~ 2002

Honorable Katherine Farroba
Administrative Law Judge
Public Utility Commission of Texas
1701 N. Congress Avenue, Suite 7-130
Austin, Texas 78701

Honorable Rowland Curry
Arbitrator
Public Utility Commission of Texas
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Southwestern Bell Telephone Company
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Dineen J. Majcher

SWB
January 20, 2000

TABLE OF CONTENTS

DOCKET NO. 20226
DOCKET NO. 20272

REPLY OF SOUTHWESTERN BELL TELEPHONE COMPANY ("SWBT") TO RESPONSES OF RHYTHMS LINKS, INC. ("RHYTHMS") AND COVAD COMMUNICATIONS COMPANY ("COVAD") TO SWBT'S COMMENTS OF JANUARY 6, 2000

Original + 15

cc: Chairman Pat Wood, III, PUC (hand delivered)
Commissioner Judy Walsh, PUC (hand delivered)
Commissioner Brett Perlman, PUC (hand delivered)
Katherine D. Farroba, Arbitrator, PUC (hand delivered)
Rowland Curry, Arbitrator, PUC (hand delivered)
All Parties of Record (via facsimile)

DOCKET NO. 20226

PETITION OF RHYTHMS LINKS, INC.	**§**	**PUBLIC UTILITY COMMISSION**
FOR ARBITRATION TO ESTABLISH	**§**	**OF TEXAS**
AN INTERCONNECTION AGREEMENT	**§**	
WITH SOUTHWESTERN BELL	**§**	
TELEPHONE COMPANY	**§**	

DOCKET NO. 20272

PETITION OF DIECA COMMUNICATIONS,	**§**	**PUBLIC UTILITY COMMISSION**
INC., d/b/a COVAD COMMUNICATIONS	**§**	
COMPANY FOR ARBITRATION OF	**§**	**OF TEXAS**
INTERCONNECTION RATES, TERMS,	**§**	
CONDITIONS AND RELATED	**§**	
ARRANGEMENTS WITH	**§**	
SOUTHWESTERN BELL TELEPHONE	**§**	
COMPANY	**§**	

REPLY OF SOUTHWESTERN BELL TELEPHONE COMPANY ("SWBT") TO RESPONSES OF RHYTHMS LINKS, INC. ("RHYTHMS") AND COVAD COMMUNICATIONS COMPANY ("COVAD") TO SWBT'S COMMENTS OF JANUARY 6, 2000

The Comments and Responses submitted by the parties in these dockets demonstrate precisely why the Texas Public Utility Commission ("Commission") should take advantage of the process set forth in its own rules, and allow itself to re-examine the proposed interconnection agreements ("Proposed Agreements") in light of the most current information.[1]

The Arbitration Award ("Award") seeks to establish public policy in reliance on developments that occurred *after the June hearing was completed*—about which the parties have not had an opportunity to comment in any form. Since the Award expressly relies on these changed circumstances, the Commission should consider the parties' views on these developments *before* taking action on the Proposed Agreements. Absent any

[1] This filing is made pursuant to PUC Proc. R. 22.78, and is a Reply to the Responses filed by Rhythms and Covad, respectively, both of which were received on January 13, 2000.

additional briefing, the Commission will be left with Proposed Agreements based on an Award that is inconsistent with the current state of the law, relies on incomplete facts and does not have the benefit of the parties' positions.

A. The Commission's Rules Permit SWBT's Comments And Further Briefing

The position of Rhythms notwithstanding,[2] SWBT's Comments and this Reply serve the exact purpose contemplated in PUC Proc. Rule 22.309; that is, they provide the Commission with insight into how best to review the arbitrated agreement in light of legal precedent. PUC Proc. Rule 22.309[c] allows the Commission to use "whatever proceeding" it deems necessary in reviewing arbitrated interconnection agreements, including "authorizing a presiding officer to conduct an expedited contested case hearing." The rules make clear that the Commission gave itself great flexibility in reviewing an arbitrated agreement, most likely due to the complexity of issues that could be raised in the interconnection context. The Commission should take advantage of its own rules and accept additional briefing on the issues raised by SWBT. Alternatively, the Commission should revise the Proposed Agreements consistent with SWBT's Comments and this Reply, as set forth below.[3]

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[2] Rhythms' position that only non-parties can file Comments under 22.309 is wrong on its face, and its request to strike SWBT's Comments should be rejected. Rule 22.309 states that an "interested person" may file Comments. Clearly, the parties are interested persons. Had the Commission wanted to bar parties from filing Comments, it would have defined the universe of those permitted to file Comments as "interested persons other than the parties." The Commission did not. Therefore, a party should not be excluded from those allowed to file Comments under Rule 22.309. SWBT's instant filings also appear consistent with the December 10, 1999, letter sent to SWBT by the Commission. The letter states that "the Comments of any interested party" (emphasis added) would be considered when the Commission reviewed the Proposed Agreements. SWBT interpreted this letter to contemplate that the parties would file Comments. *See* Attachment A.

[3] The responses of Covad and Rhythms contain numerous misstatements of law and the record. Instead of burdening the record with a complete refutation of them, SWBT will limit this Reply to an explanation as to why the Commission should revise the Proposed Agreements, the responses of Covad and Rhythms notwithstanding.

B. Commission Review Can Be Brief

SWBT believes the issues raised in its January 6 Comments can be briefed in 20 pages or less, minimizing the burden on staff and the Commissioners, and that the factual record can be supplemented simply by taking administrative notice of the DSL portion of the evidentiary record in Project No. 16251. Such a limited process will not adversely affect the parties, as they are currently marketing and providing service based on interim agreements reached last May.

Among the issues that need to be briefed:

- whether SWBT should be required to develop Operations Support Systems ("OSS") for Texas CLECs *inconsistent* with the systems development required by the *Merger Order*[4] for 13 states (including Texas)[5];
- how to reconcile the Award with the *UNE Remand Order*[6] finding that SWBT not be required to "catalogue" or "inventory" information solely for the benefit of CLECs[7];
- how SWBT can be required to provide manual loop qualification *for free*, contrary to the terms of the *Merger Order*[8];
- how to insure that SWBT recover its costs for conditioning of DSL-capable loops, rather than just 1/25th or 1/50th of its costs, as the Award provides[9];
- how to incorporate recent Pre-Ordering and Ordering process changes made during Project No. 16251[10];

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[4] *Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations*; Memorandum Opinion And Order; Adopted: October 6, 1999, Released, October 8, 1999, CC Docket No. 98-141 ("*Merger Order*").

[5] *See* pages 6-7 of SWBT's Comments filed on January 6, 2000.

[6] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* Third Report And Order And Fourth Further Notice Of Proposed Rulemaking; Adopted: September 15, 1999, Released: November 5, 1999, CC Docket No. 96-98 ("*UNE Remand Order*").

[7] *See* pages 7-8 and 9-10 of SWBT's Comments filed on January 6, 2000.

[8] *See* pages 10-12 of SWBT's Comments filed on January 6, 2000.

[9] *See* pages 12-17 of SWBT's Comments filed on January 6, 2000.

[10] *See* pages 8-9 of SWBT's Comments filed on January 6, 2000.

- what intervals are appropriate in light of Project No. 16251.[11]

C. The *Merger Order* Requires Systems Improvements For Texas CLECs Different From Award's Required Improvements

Covad and Rhythms suggest that the *Merger Order* is only a base standard for OSS improvements.[12] This begs the question. At issue is whether SWBT must create disparate systems enhancements for its Texas operations—one set under the Award and one set under the *Merger Order*. The *Merger Order* explicitly requires systems changes for all 13 states where SBC Communications Inc. ("SBC") telephone companies operate, including Texas. Specifically, the Federal Communications Commission ("FCC") has ordered SWBT to establish "uniform OSS interfaces and systems across their combined 13 in-region states that are based on the best practices,"[13] as determined by the collaborative process established by the FCC. Texas is one of those 13 states. SWBT will comply with the FCC requirements, creating the possibility that SWBT will have two concurrent Texas OSS enhancement efforts this year—one for Covad and Rhythms in Texas and one for the entire CLEC community across SBC's 13 states, including Texas.

As the cited language above sets forth, the FCC-required improvements will be the 'best practices', as determined by the industry-wide collaborative process. Should CLECs be dissatisfied with its Plan of Record, the FCC Chief of the Common Carrier Bureau can order binding arbitration.[14] By definition, any variation from the FCC's ordered improvements will be something less than what the industry and the FCC determine to be

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[11] *See* pages 19-20 of SWBT's Comments filed on January 6, 2000; note that SWBT's January 6 Comments contain other issues that the Commission should address, and should be briefed.

[12] Covad Response, page 6; Rhythms Response, page 9.

[13] *Merger Order*, at para. 381.

[14] *Merger Order*, Conditions, Appendix C, para. 15(c)(2).